Feb 14 2000

No. 99-478

Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

In The
Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the extended term sentencing provision of New Jersey's Hate Crime Statute, N.J.Stat.Ann. § 2C:44-3e (West 1995), which relies on the traditional sentencing factor of motive to increase the statutory maximum period of imprisonment that may be imposed following a conviction of the underlying offense, preserves a criminal defendant's federal constitutional rights to notice by indictment, trial by jury, and due process of law?

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (Pa1-66)[1] is reported at 159 N.J. 7, 731 A.2d 485 (1999). The opinion of the Superior Court of New Jersey, Appellate Division (Pa68-94), is reported at 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997). The opinion of the Superior Court of New Jersey, Law Division, Cumberland County (Pa138-145) is unreported .

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on June 24, 1999. The petition for a writ of certiorari was filed on September 17, 1999, and was granted by this Court on November 29, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury ... nor be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to ... trial, by an impartial jury ... and to

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[1] "Pa" refers to the appendix to the petition for a writ of certiorari; "Ja" refers to the parties' joint appendix.

be informed of the nature and cause of the accusation....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

N.J.Stat.Ann. § 2C:44-3 (West 1995) ("Criteria for sentence of extended term of imprisonment") provides, in pertinent part:

> The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S.2C:12-1a., N.J.S.2C:33-4, or a violation of N.J.S.2C:14-2, or 2C:14-3 if the grounds for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e.
>
> * * *
>
> e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

STATEMENT OF THE CASE

In the early morning hours of December 22, 1994, petitioner Charles Apprendi, Jr., a white pharmacist, fired several rounds from a loaded rifle into a nearby single-family home, using as targets two black Santa Claus decorations hanging on the front door. The residents, Michael and Mattie Fowlkes and their three children, ages nine, thirteen and sixteen, were the only black family living in petitioner's otherwise all-white neighborhood in Vineland, New Jersey. (Pa2-3; Pa100-02; Pa107-09).

Petitioner was charged by the Cumberland County, New Jersey, Grand Jury in a twenty-three count indictment with four counts of attempted murder in the first degree, four counts of aggravated assault in the second degree, four counts of possession of a firearm for an unlawful purpose in the second degree, four counts of unlawful possession of a loaded rifle in the third degree, unlawful possession of an incendiary device in the third degree, unlawful possession of an anti-personnel bomb in the third degree, four counts of harassment in the fourth degree, and unlawful possession of a firearm silencer in the fourth degree. (Ja2-12).

On July 24, 1995, petitioner entered a guilty plea before the Honorable Rushton H. Ridgway, J.S.C., to counts three and eighteen of the indictment charging second degree possession of a firearm for an unlawful purpose, contrary to N.J.Stat.Ann. § 2C:39-4a (West 1995), and count twenty-two charging third degree unlawful possession of an anti-personnel bomb, contrary to N.J.Stat.Ann. § 2C:39-3a (West 1995). (Ja15-16; Ja24-25; Ja36-41). Petitioner admitted at the plea hearing that his unlawful purpose for shooting at the Fowlkes' home was to frighten or harass the family. (Ja33-41).

Through petitioner's guilty plea, the State satisfied its burden to prove beyond a reasonable doubt the four elements of possession of a weapon for an unlawful purpose under

N.J.Stat.Ann. § 2C:39-4a: one, that petitioner had a firearm; two, that petitioner possessed it; three, that petitioner's purpose or conscious objective was to use it against the person or property of another; and, four, that petitioner intended to use it in a manner that was proscribed by law. *State v. Harmon*, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

The prosecution timely served petitioner with notice that it was seeking an enhanced term of imprisonment on count eighteen pursuant to N.J.Stat.Ann. § 2C:44-3e (West 1995), the extended term provision of New Jersey's "Hate Crime Statute." (Ja21; Ja41; Ja43; Pa166). Under this statute, the same criminal conduct may be more heavily punished if "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Ibid.*[2] Upon application of the prosecuting attorney, an extended term must be imposed if the sentencing court "finds, by a preponderance of the evidence, the grounds in subsection e." *Ibid.* The ordinary sentencing range for a second degree crime is between five and ten years. N.J.Stat.Ann. § 2C:43-6a(2) (West 1995). The extended sentencing range for a second degree crime is between ten and twenty years, N.J.Stat.Ann. § 2C:43-7a(3) (West 1995), which is the ordinary sentencing range for a first degree crime. N.J.Stat.Ann. § 2C:43-6a(1) (West 1995).

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[2] As originally enacted, N.J.Stat.Ann. § 2C:44-3e required that the underlying crime be committed "at least in part with ill will, hatred or bias toward the victim." The 1995 amendment, 1995 N.J. Laws, c.211, § 3, excised this phrase in response to *State v. Mortimer*, 135 N.J. 517, 641 A.2d 257, *cert. denied*, 513 U.S. 970 (1994), which found the same language in N.J.Stat.Ann. § 2C:33-4d (West 1995) (a provision of New Jersey's hate crime law addressing harassment) unconstitutionally vague. (Pa13). The amendment also added "gender" and "handicap" to the protected classes of victims.

At the extended term sentencing hearing held before Judge Ridgway, Michael Fowlkes recalled that on December 22, 1994, he and his wife awoke at 1:55 a.m. to the sounds of gun shots and shattering glass. Eight bullets had been fired at their home, and the front French doors, which were panes of clear glass set in a burgundy frame, were riddled with bullets. (Pa107-09). One of the bullets lodged in the wall of their daughter's bedroom. (Pa109).

Petitioner was arrested shortly thereafter, and he admitted to Detective Dennis D'Augostine that he fired shots into the Fowlkes' home because the residents were black and he was "giving them a message" that they were unwelcome in petitioner's neighborhood. Petitioner knew that a black family lived there because he had seen them outside in the yard, but he did not know the victims personally. (Pa174-78; Pa 299).

Petitioner presented seven character witnesses at the hearing who testified that petitioner did not have a reputation for racial bias against blacks. (Pa182-203).

Petitioner also presented the opinion of Doctor Gerald Cooke, a psychologist who examined petitioner at the Cumberland County Jail on February 15, 1995. (Pa204-07). According to Doctor Cooke, petitioner told him that he had consumed eight alcoholic beverages and some medication on December 22, 1994, and had "feelings that he wanted to destroy something" when the Fowlkes' purple door caught his attention. (Pa210-11). After firing at the Fowlkes' front door, petitioner returned home, hid the gun and went to sleep. (Pa211). The police arrived twenty minutes later and told him that if he cooperated "they would be less stringent." (Pa211-12). Doctor Cooke admitted that he had "no way of knowing" whether petitioner told him the truth during the interview. (Pa228).

Doctor Cooke ruled out the possibility that petitioner suffered from insanity or a diminished capacity. (Pa207-08). The doctor did find, however, a pattern of alcohol abuse and drug dependency. (Pa208-09). He concluded that petitioner had an obsessive-compulsive disorder, mood swings and an impulse disorder of kleptomania. (Pa216-18). The synergistic effect of the drugs and alcohol, combined with petitioner's "anxious and overcontrolled" personality, created "the kind of personality of an individual who would [tell a lie] to get out of this kind of situation." (Pa218-19). Doctor Cooke acknowledged that petitioner had never been treated for any psychiatric disorders or alcohol and drug abuse, and was in fact employed as a pharmacist at the time of the shootings. (Pa223).[3]

Petitioner testified on his own behalf. He claimed that when the police came to his house at 3:00 a.m. of the morning of his arrest he was "extremely exhausted and depressed." Petitioner alleged that he drank three or four vodka drinks several hours before and took medication for his "irritable bowel syndrome," an "opiate" and a "minor tranquilizer." (Pa236-39). Petitioner denied being a racist and claimed that he admitted to a having a racial bias only because Detective

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[3] Petitioner's description of himself at the time he committed the offenses in question as "mentally disabled by an obsessive compulsive disorder and drug and alcohol abuse" (Pet. Brief at 23) distorts the record below. Petitioner's own expert, Doctor Cooke, ruled out the possibility that petitioner suffered from insanity or a diminished capacity. (Pa207-08). Similarly, petitioner's claim that "[i]t is undisputed that [he] was intoxicated when he fired his gun at his neighbors' purple door" (Pet. Brief at 22) is nothing more than a self-serving assessment of his mental condition at the time of the offense. No one other than petitioner himself testified to the amount of alcohol he consumed or drugs he ingested prior to the shooting. All that Doctor Cooke had to rely upon in assessing petitioner's level of intoxication that night was what petitioner told him almost two months later, on February 15, 1995. (Pa 205).

D'Augostine was scaring him with stories of homosexuality and AIDS among the prison population. (Pa242-45).

On cross-examination, petitioner admitted that when the "glass and purple door ... caught [his] eye," he went home, retrieved his rifle and returned to the Fowlkes' residence. (Pa251-52). The rifle was equipped with a "red-dot" scope for accurate aim, as well as a silencer, which he characterized as "toys." (Pa252-53). Petitioner admitted that it would be in his best interest to tell Judge Ridgway that he is not a racist. (Pa255-56).

On rebuttal, Detective D'Augostine testified that petitioner "clearly understood" his *Miranda* rights. (Pa281). In response to the detective's question, petitioner stated that although he had consumed two alcoholic drinks in the late afternoon and two more at 10:30 p.m., he was not under the influence of any alcohol or drugs. (Pa283). Petitioner's breath bore no odor of alcohol, his eyes were not bloodshot, he did not sway and he answered the detective's questions clearly. (Pa284). Petitioner admitted that he fired at the Fowlkes' house on two separate occasions. (Pa288-89). The detective never threatened petitioner, nor did he promise leniency if he cooperated. (Pa286). The interview was immediately terminated when petitioner requested an attorney. (Pa289). Petitioner stipulated that his confession was given in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). (Pa172).

Judge Ridgway found Detective D'Augostine to be credible and "had difficulty believing that [petitioner] was attracted to [the Fowlkes' front] door by the color. And that something went off in his ... intoxicated state of mind that he wanted to destroy the door." (Pa142-43). The judge recalled petitioner's admission under oath at the plea proceeding that his unlawful purpose in shooting at the Fowlkes' house was to scare the occupants. The court was satisfied that petitioner's act was motivated by racial bias and that petitioner was now

denying any such prejudice to avoid the enhanced punishment for a bias crime. (Pa143-44). Judge Ridgway found that the State met its burden of proving by a preponderance of the evidence that petitioner's act was racially motivated and, therefore, petitioner was subject to an extended term of imprisonment. (Pa145). Petitioner was sentenced on count eighteen to an extended custodial term of twelve years with a mandatory period of parole ineligibility of four years. (Pa161).[4]

In a published opinion filed August 19, 1997, the Superior Court of New Jersey, Appellate Division, affirmed petitioner's convictions and sentences and declared N.J.Stat.Ann. § 2C:44-3e constitutional. *State v. Apprendi*, 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997) (Pa81-94). The majority found that the statute did not make racial bias an essential element of the predicate crime. The statute was aimed at deciphering a defendant's motive, a traditional sentencing factor. The imposition of an extended term of imprisonment following a finding of bias by the sentencing court by a preponderance of the evidence standard did not violate the constitutional requirement that the State must prove each element of an offense by the reasonable doubt standard. (Pa86-94).

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[4] The mandatory minimum term was not imposed pursuant to the Hate Crime Statute but was authorized by N.J.Stat.Ann. § 2C:43-6c (West 1995), because petitioner was convicted of possession of a firearm with intent to use it against the person of another. (Pa4).

On count three, petitioner was sentenced to an ordinary term of seven years imprisonment with a mandatory period of parole ineligibility of three years, to be served concurrently to the term imposed on count eighteen. On count twenty-two, petitioner was sentenced to an ordinary term of three years imprisonment, to be served concurrently to the terms imposed on counts three and eighteen. (Pa161).

The concurring member of the panel agreed that N.J.Stat.Ann. § 2C:44-3e was constitutional under the majority's analysis, adding that the sentencing enhancer of the Hate Crime Statute appears in the general sentencing provisions of New Jersey's Code of Criminal Justice and was adopted after the Code's provisions establishing the crimes. The concurring judge compared the Hate Crime Statute to New Jersey's Graves Act which mandates ineligibility terms on sentences where a judge finds by a preponderance of the evidence that a defendant used or possessed a firearm, notwithstanding that the offense for which he or she was convicted did not necessarily involve use or possession of a firearm as an element thereof. (Pa77-80).

The dissenting judge believed that the word "purpose" as used in the Hate Crime Statute was synonymous with "intent" and was thus an element of the predicate offense that had to be proven by the finder of fact beyond a reasonable doubt. (Pa68-76).

Petitioner filed with the Supreme Court of New Jersey an appeal as of right from the dissent in the Appellate Division pursuant to N.J. Court Rule 2:2-1(a)(2). On June 24, 1999, the Supreme Court of New Jersey affirmed the Appellate Division opinion and determined that the Hate Crime Statute did not violate the United States Constitution. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999) (Pa1-28). Analyzing the Hate Crime Statute under relevant United States Supreme Court precedent, the court concluded that petitioner's biased motivation behind the shooting was a sentencing factor to be resolved by the sentencing judge, and not an element of the offense requiring a jury finding beyond a reasonable doubt. (Pa2; Pa22).

Two of the seven members of the court dissented, finding the statute violative of the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment of the United States Constitution. (Pa29-66).

Petitioner filed a petition with this Court for a writ of certiorari on September 20, 1999, which was granted on November 29, 1999. *Apprendi v. New Jersey*, __ U.S. __, 120 S.Ct. 525 (1999).

SUMMARY OF ARGUMENT

N.J.Stat.Ann. § 2C:44-3e (West 1995), the extended term provision of New Jersey's Hate Crime Statute, is a sentencing enhancement provision, not a separate criminal offense. N.J.Stat.Ann. § 2C:44-3e is not invoked until after a criminal defendant has been duly convicted beyond a reasonable doubt of every essential element of a substantive offense defined elsewhere in New Jersey's Code of Criminal Justice. The effect of N.J.Stat.Ann. § 2C:44-3e is to lengthen the maximum term of imprisonment to which the convicted defendant is exposed when the sentencing court is convinced by a preponderance of the evidence that the substantive offense was motivated by racial animus.

The text of N.J.Stat.Ann. § 2C:44-3e supports this conclusion. N.J.Stat.Ann. § 2C:44-3e is not a subsection of any definition of any substantive offense. The statute instead appears in the general sentencing section of the Code and expressly identifies the statutory provision as a sentencing factor. The New Jersey Legislature's intention to make racial bias a sentencing factor applicable to all crimes, rather than an element of enumerated offenses, is clear from the textual analysis of the statute itself.

Applying the constitutional calculus formulated by the Court in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and revisited in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the penalty provision of the Hate Crime Statute does not violate a criminal defendant's right to due process of law under the Fifth and Fourteenth Amendments and right to notice by indictment and trial by jury under the Sixth Amendment. Petitioner would eliminate the *McMillan* test,

substituting in its stead a "bright line" rule that any fact resulting in an increase of the maximum sentence, with the exception of recidivism, must be resolved by a jury. But a "bright line" rule fails to account for the state legislatures' historic role to define elements of an offense and to fix appropriate criminal penalties. A "bright line" rule will also have negative consequences for criminal defendants because it will compel the State to introduce to the jury highly prejudicial evidence of racism in order to meet its burden of proving racial bias beyond a reasonable doubt. The multi-prong *McMillan* test better balances the states' role in the criminal justice system with defendant's federal constitutional rights.

New Jersey's Hate Crime Statute easily meets the *McMillan* test. The challenged statute does not create any impermissible presumptions nor does it relieve the prosecution of its burden of proving guilt. The differential in sentencing is not between a nominal fine and mandatory life sentence but merely increases the ordinary sentencing range for a second degree offense of between five to ten years to an extended range of between ten and twenty years. Petitioner's actual sentence was increased by only two years. The statute does not change the definition of any existing offense or create a separate offense calling for a separate penalty, and there is nothing to imply that the state legislature drafted this statute to avoid the prosecution's reasonable doubt standard. The statute gives "no impression of having been tailored to permit the [racial animosity] finding to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88. The New Jersey Legislature "simply took one factor that has always been considered to bear on punishment ... and dictated the weight to be given that factor...." *Id.* at 89-90.

Although New Jersey's Hate Crime Statute increases the maximum term (rather than imposing a mandatory minimum as was the result of the statute examined in *McMillan)*, the Court has expressly "rejected an absolute rule that an

enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge v. California*, 524 U.S. 721, 729 (1998); *see also Almendarez-Torres*, 523 U.S. at 247. Thus, in *Almendarez-Torres*, the Court upheld a federal statute permitting the increase of the maximum sentence following a judicial finding of recidivism, a traditional sentencing factor.

The Hate Crime Statute targets motive, another traditional sentencing factor. Motive is not the equivalent of intent or *mens rea*. It is admissible at trial by either party, but is not a required element of any offense to be proven by the prosecution unless the legislature makes it so. *See Pointer v. United States*, 151 U.S. 396, 414-15 (1894). The New Jersey Legislature chose to designate motive as an aggravating circumstance at sentencing. That racial animus serves to increase the maximum term of imprisonment a criminal defendant must serve does not transform this traditional sentencing factor into an essential element of an offense.

Motive is highly relevant to the sentencing decision because it reveals the defendant's character at the moment the crime is committed. New Jersey's Hate Crime Statute demands that a criminal defendant's motive be verified during an adversarial hearing before it may be considered by the sentencing judge, further assuring its reliability as a sentencing factor. The statutorily-mandated adversarial proceeding also guarantees that criminal defendants are afforded procedural due process of law prior to the imposition of an extended term of imprisonment pursuant to N.J.Stat.Ann. § 2C:44-3e.

That other jurisdictions have chosen different procedures for punishing hate crimes does not render New Jersey's statute unconstitutional. Federalism demands "[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement." *McMillan*, 477 U.S. at 90. New Jersey has enacted a constitutionally-valid statutory scheme

permitting the sentencing court to impose an extended term of imprisonment once it is satisfied by a preponderance of the evidence that the underlying offense was racially motivated. The Supreme Court of New Jersey correctly concluded that the Hate Crime Statute "falls on the permissible side of the constitutional line," *id.* at 91, and its judgment should be affirmed.

ARGUMENT

THE EXTENDED TERM PROVISION OF NEW JERSEY'S HATE CRIME STATUTE AUTHORIZING AN ENHANCED MAXIMUM TERM OF IMPRISONMENT BASED ON THE TRADITIONAL SENTENCING FACTOR OF MOTIVE PRESERVES A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS OF NOTICE BY INDICTMENT, TRIAL BY JURY, AND DUE PROCESS OF LAW.

The statutory scheme created by the extended term provision of New Jersey's Hate Crime Statute, N.J.Stat.Ann. § 2C:44-3e (West 1995), punishes a criminal defendant's biased motive in committing the substantive offense. As petitioner concedes (Pet. Brief at 4), New Jersey's ability to enact penalty enhancement statutes in the effort to combat bias-motivated criminal conduct is beyond constitutional challenge. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). He argues, nonetheless, that the method by which New Jersey prosecutes hate crimes is unconstitutional, because N.J.Stat.Ann. § 2C:44-3e dispenses with notice by indictment and trial by jury on the motive finding. His argument fails because the United States Constitution does not require that motive be an essential element of any crime. *See Pointer v. United States*, 151 U.S. 396, 414-15 (1894). The New Jersey Legislature has chosen to designate motive as a sentencing factor, and not an element of possession of a weapon for an unlawful purpose, N.J.Stat.Ann. § 2C:39-4a (West 1995).

See State v. Harmon, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

By petitioner's own admission at the plea hearing, the criminal intent or *mens rea* element necessary to establish the conviction, that is, his "purpose to use [a firearm] unlawfully against the person or property of another," N.J.Stat.Ann. § 2C:39-4a, was satisfied by his acknowledged purpose to frighten or harass the family asleep inside the Fowlkes' home. (Ja33-41). Petitioner's underlying reason for wanting to frighten or harass the family, that is, his motive, was to send the Fowlkes family "a message" that blacks were unwelcome in petitioner's neighborhood. (Pa174-78; Pa299). While the prosecution bore the burden to prove petitioner's criminal intent (his unlawful purpose) behind the shooting (his conduct), it had no burden under New Jersey law to prove that his conduct was influenced by racial hatred (his motive) in order to obtain a conviction. Motive is relevant to the issue of intent but is not an essential element of possession of a weapon for an unlawful purpose under New Jersey law.

A. Under Basic Principles of Statutory Construction, New Jersey's Hate Crime Statute Does Not Create a New Element of the Substantive Crime.

Before turning to the constitutional question, the State highlights that under the structural approach of *Almendarez-Torres v. United States*, 523 U.S. 224, 229-39 (1998), and *Jones v. United States*, 526 U.S. 227, 232-39 (1999), the extended term provision of New Jersey's Hate Crime Statute is clearly a sentencing factor. The statute appears in a general sentencing provision of New Jersey's Code of Criminal Justice entitled "Authority of Court in Sentencing," and was adopted long after the Code's provisions establishing the underlying crimes. *State v. Apprendi*, 304 N.J. Super. 147, 160, 698 A.2d 1265, 1272 (App. Div. 1997) (Stern, J., concurring) (Pa79). The statute is expressly designated "Criteria for sentence of extended term of imprisonment." Unlike the

federal carjacking statute at issue in *Jones* which blended sentencing upgrade provisions within the text defining the crime itself, the plain language and structure of the Hate Crime Statute unquestionably establishes that the statute does not add any new elements to any crime as defined in the Code, but was intended only as a sentencing enhancer. *See Jones*, 526 U.S. at 232 ("some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors"), and *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986) (express identification of statutory provision as sentencing factor). While the actor's biased motive might well have been included as an element of certain substantive offenses, the New Jersey Legislature chose not to redefine any offense in order to so include it, and this Court should "hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties." *McMillan*, 477 U.S. at 86. The placement of this statute within New Jersey's Code of Criminal Justice, as well as the plain language of the statute itself, manifests the obvious legislative intent.

The Supreme Court of New Jersey in *Apprendi*, it must be noted, chose not to rely upon this structural approach: "Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (Pa16). But the fact that N.J.Stat.Ann.§ 2C:44-3e is so readily identifiable as a separate sentencing factor under basic principles of statutory construction is a solid stepping-stone on the path leading to the ultimate determination that the extended term provision of New Jersey's Hate Crime Statute is constitutional.

B. Applying the Constitutional Calculus Formulated By This Court in a Line of Authorities Addressing the "Sentencing Factor Versus Element" Debate, New Jersey's Hate Crime Statute Guarantees Petitioner's Fifth and Sixth Amendments Rights.

An indictment must set forth each element of the crime that it charges. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Concomitantly, the Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship,* 397 U.S. 358, 364 (1970). But an indictment "need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime," *Almendarez-Torres*, 523 U.S. at 228, and the State need not prove beyond a reasonable doubt factors relevant to sentencing. *McMillan*, 477 U.S. at 92; *Patterson v. New York*, 432 U.S. 197, 207 (1977). Within limits, the question whether a factor is an element of the offense or a sentencing factor is generally left to the legislature. *Almendarez-Torres*, 523 U.S. at 228.

Applying the *Winship* principle that every element must be proven beyond a reasonable doubt, the Court held in *Mullaney v. Wilbur,* 421 U.S. 684, 699 (1975), that under a Maine statute that defined the offense of first degree murder in terms of the absence of heat of passion, due process required the State to bear the burden on that fact. "Read literally, this language ... suggests that [the legislature] cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt." *Almendarez-Torres*, 523 U.S. at 240. Two years after the *Mullaney* decision, however, the Court in *Patterson v. New York*, 432 U.S. at 207, made "absolutely clear that such a reading of Mullaney is wrong." *Almendarez-Torres*, 523 U.S. at 240.

The *Patterson* Court upheld New York's murder statute which reduced murder to manslaughter if the defendant proved by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional disturbance. Thus, in *Patterson*, the Court "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (quoting *Patterson v. New York*, 432 U.S. at 214).

In *McMillan,* the Court examined the constitutionality of a provision of Pennsylvania's Mandatory Minimum Sentencing Act, authorizing judges to sentence anyone convicted of certain enumerated felonies to no less than five years imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. *Id.* at 80-82. Rebuffing the petitioners' contention that visible possession of a firearm was an element of the offense that had to be proven beyond a reasonable doubt, the Court noted that the legislature's definition of the elements of the offense is usually dispositive in distinguishing between essential elements of an offense and mere sentencing factors. *Id.* at 85.

The *McMillan* Court scrutinized the Pennsylvania statute using multiple criteria to determine the constitutionality of imposing a mandatory minimum sentence based on a finding of a fact not proven beyond a reasonable doubt. *Id.* at 87-88. The Court found that the Act created no presumptions of guilt, nor did it relieve the prosecution of its burden of proving guilt and only became applicable after a defendant was duly convicted of the crime for which he is to be punished. *Id.* at 87. A defendant sentenced pursuant to the Act did not face, as did the defendant in *Mullaney*, "'a differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *Ibid.* (quoting *Mullaney v. Wilbur*, 421 U.S. at 700). The statute did not alter the maximum penalty for the crime committed but operated solely to limit the sentencing court's

discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. *McMillan*, 477 U.S. at 87-88. Nor was a separate offense calling for a separate penalty created. *Id.* at 88. Finally, the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Ibid.*; *see also Almendarez-Torres*, 523 U.S. at 242-43. The Pennsylvania Legislature "did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -- the instrumentality used in committing a violent felony -- and dictated the precise weight to be given that factor if the instrumentality is a firearm." *McMillan*, 477 U.S. at 89-90.

The *McMillan* Court speculated in *dicta* that the claim that a sentencing factor was really an element of the offense "would have at least more superficial appeal" if a finding of such fact exposed the defendant to greater or additional punishment. *Id.* at 88. That consideration was subsequently tempered in *Almendarez-Torres* in which the Court rejected the argument that any factor triggering an increase in the maximum permissive sentence is an element of the offense which must be proven beyond a reasonable doubt.

In *Almendarez-Torres*, the Court considered whether subsection (b) of 8 U.S.C. § 1326 (Supp. II 1996) described an element of an offense or was simply a sentence enhancer. Subsection (a) of this statute defines a crime by forbidding an alien who once was deported to return to the United States without special permission, and it authorizes the imposition of a prison term of up to, but no more than, two years. 8 U.S.C. § 1326 (a). Subsection (b)(2) of the same statute authorizes the imposition of a prison term of up to, but no more than, twenty years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2). Employing the constitutional analysis

formulated in *McMillan*, the Court held that subsection (b)(2) of 8 U.S.C. § 1326 did not describe an element of an offense but simply was a sentence enhancer. *Almendarez-Torres,* 523 U.S. at 242-43.

The Court rejected the argument that because the recidivist statute before it altered the maximum sentence and created a wider range of appropriate punishment than did the statute in *McMillan* it necessarily failed to meet the *McMillan* test. *Almendarez-Torres*, 523 U.S. at 243. "These differences do not change the constitutional outcome for several basic reasons." *Ibid.* First, recidivism, the sentencing factor at issue in the alien deportation statute, "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Ibid.* Second, the difference between a permissive maximum and a mandatory minimum "does not systematically, or normally, work to the disadvantage of a criminal defendant. To the contrary, a statutory minimum binds a sentencing judge; a statutory maximum does not." *Id.* at 244. Third, judges have "typically exercised their discretion within broad sentencing ranges" such as that authorized by 8 U.S.C. § 1326. *Ibid.* Finally, the statute at issue did "not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in McMillan, to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense." *Id.* at 246.

One year later, the Court revisited the "element versus sentencing factor" debate in *Jones*, *supra*, in which it was determined that a penalty provision based on a finding of serious bodily injury or death intertwined within the definition of the substantive crime of carjacking under the federal carjacking statute, 18 U.S.C. § 2119 (Supp. IV 1992), was not a sentence enhancer that could be found by the sentencing court by a preponderance of the evidence, but historically was an element of the offense that had to be proven to the trier of fact beyond a reasonable doubt.

At issue in *Jones* were the enhanced penalties available under the grading sections of the federal carjacking statute if the offense resulted in serious bodily injury (requiring an increase in imprisonment from fifteen years up to twenty-five years) or death (requiring an increase in imprisonment from fifteen years up to a life term). The indictment in *Jones* made no reference to serious bodily injury, and the jury was not instructed to find this fact beyond a reasonable doubt. *Jones*, 526 U.S. at 230. Jones was found guilty of carjacking, ordinarily punishable by a term of imprisonment not to exceed fifteen years. 18 U.S.C. § 2119(1). The presentence report, however, indicated that one of the victims had suffered serious bodily injury during the carjacking and the district court thus imposed a twenty-five-year sentence in accord with 18 U.S.C. § 2119(2). The United States Court of Appeals for the Ninth Circuit did not read § 2119(2) as setting out an element of an independent offense and upheld the conviction and sentence. *Jones*, 526 U.S. at 231. The Court reversed.

The federal carjacking statute was structurally muddled in its treatment of injury as an element or penalty factor, thus prompting the *Jones* Court, out of respect to Congress, to invoke the doctrine of constitutional doubt: "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones*, 526 U.S. at 239 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Applying this doctrine, the Court concluded that the enhanced penalty provision of the federal carjacking statute should not be viewed as a mere sentencing factor, in part, because the degree of injury to a victim has traditionally been treated, both by Congress and by state legislatures (including New Jersey, *see State v. Federico*, 103 N.J. 169, 510 A.2d 1147 (1986)), as an element of the predicate offense, such as aggravated robbery. *Jones*, 526 U.S. at 234-35. The Court thus construed § 2119 as establishing three

separate offenses by the specification of distinct elements. *Id.* at 262.

In reaching this result, the Court was careful not to overrule its prior decision in *Almendarez-Torres* that "not every fact expanding a penalty range must be stated in a felony indictment." *Id.* at 248. Instead, the *Jones* Court acknowledged that recidivism, the factor in issue in *Almendarez-Torres*, historically is treated as a sentencing enhancer and is "potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Id.* at 249. Similarly, the instrumentality used in committing a violent felony "has always been considered by sentencing courts to bear on punishment." *McMillan*, 477 U.S. at 90. Indeed, the *Jones* Court did "not announce a new principle of constitutional law, but merely interpret[ed] a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." *Jones*, 526 U.S. at 251 n.11.

In discussing the rule of "constitutional doubt" the *Jones* Court explained that the Court's precedents "suggested," but did not establish, a constitutional principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt." *Id.* at 243 n.6. It is of utmost significance, however, that in neither *Almendarz-Torres* nor *Jones* was the question of motive as a sentencing factor presented. The Court has "rigidly adhered" to the command that it is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885); *see also Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). Nothing in *Jones* requires this Court to find

unconstitutional the extended term provision of New Jersey's Hate Crime Statute. To the contrary, the penalty enhancer embodied in N.J.Stat.Ann. § 2C:44-3e is based upon motive, a traditional sentencing factor that need not be charged in the indictment or submitted to the jury.[5]

i. The *McMillan* Multi-Faceted Constitutional Test Protects a Criminal Defendant's Rights and Preserves a State Legislature's Historic Role in Defining Elements of Crimes.

This Court should resist the temptation to erect a quick and pat "bright line" rule that dispenses with an individualized constitutional analysis of a statutory sentencing enhancer. The lure of a "bright line" rule is, of course, that it can be applied blindly by state courts without further guidance. But a blanket rule will severely weaken both the state legislatures' historic function within the criminal justice system to define the elements required for a substantive offense of which the defendant is charged, *McMillan*, 477 U.S. at 85; *Patterson v. New York*, 432 U.S. at 210, and their primary responsibility to fix appropriate criminal penalties. *Mitchell*, 508 U.S. at 486; *Payne v. Tennessee*, 501 U.S. 808, 824 (1991).

For an equally important reason, the Court has thus far rejected on two occasions the type of absolute rule advocated by petitioner that any fact, other than a prior conviction, constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed. *Monge*, 524 U.S. at 729; *Almendarez-Torres*, 523 U.S. at

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[5] Contrary to petitioner's reading of the case, *United States v. Gaudin*, 515 U.S. 506 (1995), is not "intriguingly on point." (Pet. Brief at 32). In *Gaudin*, the government conceded that materiality was an essential element of the crime of perjury. The question, then, was whether the element of materiality could be found by the judge, and not the jury. *Id*. Here, there is no concession by the State that motive is an essential element of any offense.

234-35. Labeling a sentencing factor an element of an offense exposes the jury to prejudicial information, against a defendant's best interests, that may unduly influence the verdict:

> One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense, but there are also cases in which fairness calls for defining a fact as a sentencing factor. A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute that amount of drugs allegedly involved.

Monge, 524 U.S. at 729. Similarly, in *Almendarez-Torres*, 523 U.S. at 235, the Court recognized the "significant prejudice" to a defendant if the Government were required to prove to the jury that the defendant was previously deported subsequent to a conviction for commission of an aggravated felony.

The Supreme Court of New Jersey, in *Apprendi*, has identified similar prejudice to a defendant if racial bias were made an element of the predicate offense subject to a jury finding beyond a reasonable doubt:

> To allow generally in criminal trials proof of the biases of the accused creates an added risk of prejudice for defendants. It would open trials to evidence of former acts of bias on the part of the actor. It would inject into the trial of cases issues of racial or ethnic bias that have a potential to inflame a jury.

(Pa24) (internal citations omitted). Petitioner himself insists that "few epithets betray more condemnation than that of 'racist.'" (Pet. Brief at 38). If, as petitioner contends, racial bias were an element of the offense, the prosecution would have no choice but to prove that element beyond a reasonable doubt, necessitating the introduction of far greater inflammatory evidence of racism. *Cf. Monge, supra; Almendarez-Torres, supra; see also State v. Mortimer*, 135 N.J. 517, 538, 641 A.2d 257, 267, *cert. denied*, 513 U.S. 970 (1994) (noting the "danger of undue prejudice" attendant to the introduction at trial of evidence of a "defendant's bigoted thoughts, expressions, and associations"); *State v. Crumb*, 277 N.J. Super. 311, 649 A.2d 879 (App. Div. 1994) (same). On the other hand, treating racial bias as a sentencing factor to which only the court and not the jury is privy minimizes the quantity of prejudicial evidence submitted at trial, thus reducing the risk of antagonizing the jury and increasing the possibility of a complete acquittal or of a conviction of a less serious offense.

Severance of counts of the indictment is an option to a criminal defendant only when the count alleging racial bias can be isolated from the remaining counts. *See State v. Crumb*, 277 N.J. Super. at 321, 649 A.2d at 884. It is not an option, however, where, as in petitioner's case, the substantive offenses listed in the indictment charging attempted murder, aggravated assault, and possession of a weapon for an unlawful purpose are all alleged to be racially motivated. If racial bias is deemed an essential element of the substantive offenses charged, bifurcation is impossible. Only counts of the indictment, not elements contained within each count, can be severed and tried separately. As a practical matter, then, criminal defendants reap a tangible benefit from the legislature's decision to make bias motive an aggravating factor to be considered at a separate sentencing proceeding,

rather than an element of the substantive offense to be proven to the jury beyond a reasonable doubt.[6]

A "bright line" rule also conflicts with well-established death penalty jurisprudence. There is no Sixth Amendment mandate that aggravating factors submitted by the prosecution in the penalty phase of a capital trial be determined by a jury, *Walton v. Arizona*, 497 U.S. 639 (1990); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984); or proven beyond a reasonable doubt. *See State v. Ramseur*, 106 N.J. 123, 186, 524 A.2d 188, 219 (1987). This is because an aggravating factor submitted at the penalty phase "is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" *Hildwin v. Florida*, 490 U.S. at 640 (quoting *McMillan*, 477 U.S. at 86); *accord Walton v. Arizona*, 497 U.S. at 649 (aggravating circumstances are standards to be used during the sentencing phase of the capital murder case to assist in the choice of sentencing a defendant to death or to life imprisonment and as such are not separate elements of the crime). Thus, "adopt[ing] a rule that any significant increase in a statutory maximum sentence would trigger a Constitutional 'elements' requirement ... would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here." *Almendarez-Torres,* 523 U.S. at 247.

The *Jones* Court attempted to reconcile this anomaly by "characteriz[ing] the finding of aggravating facts falling within

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[6] The court in *Crumb* perceived "little cost to judicial efficiency resulting from severance" of the bias count, a fourth degree offense, from the murder count, because if the jury convicted defendant of the homicide offense, it was unlikely that the State would proceed on the bias offense. *State v. Crumb*, 277 N.J. Super. at 321, 649 A.2d at 884.

the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *Jones*, 526 U.S. at 251. But this distinction elevates form over substance to an unforgiving degree. If the demarcation between judge and jury depends solely on how a court chooses to "characterize" a particular statute, without regard to what the legislature plainly intended to accomplish, then a defendant such as petitioner whose maximum term was increased by a mere two years may have a constitutional right to a jury finding of the sentencing factor of motive under the "reasonable doubt" standard, while a capital defendant facing death will not. *See id.* at 272 (Kennedy, J., dissenting).[7]

Further, "'the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged.'" *McMillan*, 477 U.S. at 85 (emphasis in original) (quoting *Patterson v. New York*, 432 U.S. at 210). When it is clear that the state legislature intended to treat an aggravating circumstance as a sentencing factor, and not as an element of the substantive offense, it should make no constitutional difference how the legislature classified the sentencing provision. Here, the New Jersey Legislature opted to add an extended term of imprisonment on top of the statutory maximum available for the substantive offense when the aggravating factor of racial bias is found by the judge. It could have reached the same result by increasing the statutory range for the substantive offense and reserving the maximum sentence authorized when the racial bias factor is found by the

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[7] Without denigrating the "significance of the jury's role as a link between the community and the penal system," the State notes that state legislation, too, conveys the "community's voice." *Spaziano v. Florida*, 468 U.S. at 462. Through the New Jersey Legislature, its constituents have indicated their approval of hate crime legislation that increases a criminal defendant's punishment based on a judge's finding, at sentencing, that the underlying offense was racially motivated. *See id.*

judge. *Cf. Almendarez-Torres*, 523 U.S. at 245 (finding by judge of recidivism increases the sentence within "the statute's broad permissive sentencing range" from two to twenty years). Petitioner would face the same term of incarceration under either statutory scheme.

Finally, that a "bright line" rule is to be avoided is apparent from the result in *Almendarez-Torres* in which the Court found that an increase in sentence beyond the statutorily-authorized range for the predicate offense based on recidivism does not violate the right to notice by indictment. The rule proffered by petitioner simply incorporates an exception designed to preserve the holding in *Almendarez-Torres*. But there are other appropriate sentencing factors, including racial bias, not yet considered by this Court that mechanically, and unfairly, would be deemed unconstitutional under a "bright line" rule.

This Court should adhere instead to the multi-faceted test formulated in *McMillan* and adopted in *Almendarez-Torres*. In *McMillan*, the Court noted, "[o]ur inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* [*v. Patterson*, 386 U.S. 605 (1967)] than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." *McMillan*, 477 U.S. at 91. The *McMillan/Almendarez-Torres* test is entirely workable, as evidenced by the ease with which the Supreme Court of New Jersey was able to apply it to the Hate Crime Statute.

Under the *McMillan* test, New Jersey's Hate Crime Statute withstands constitutional scrutiny. N.J.Stat.Ann. § 2C:44-3e does not create any impermissible presumptions, nor does it relieve the prosecution of its burden of proving guilt; indeed, it is entirely inapplicable unless the prosecution first proves a defendant's guilt of the underlying offense beyond a reasonable doubt. *See McMillan*, 477 U.S. at 87. The

differential in sentencing is not between a nominal fine and mandatory life sentence, *see Mullaney v. Wilbur*, 421 U.S. at 700, but merely increases the ordinary sentencing range for a second degree offense of between five to ten years, N.J.Stat.Ann. § 2C:43-6a(2) (West 1995), to an extended range of between ten and twenty years, N.J.Stat.Ann. § 2C:43-7a(3) (West 1995). The statute does not change the definition of any existing offense or create a separate offense calling for a separate penalty, and there is nothing to imply that the state legislature drafted this statute to avoid the prosecution's reasonable doubt standard. *See McMillan*, 477 U.S. at 89-90; *see also* Pa20-22. New Jersey's Hate Crime Statute gives "no impression of having been tailored to permit the [racial animosity] finding to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88. The New Jersey Legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the weight to be given that factor...." *Id.* at 89-90.

The sole *McMillan* factor with which the Hate Crime Statute is at odds is that the statute exposes petitioner to additional punishment. *See id.* at 88. As *Almendarez-Torres*, 523 U.S. at 243-46, and *Monge*, 524 U.S. at 729, make plain, however, this difference is not by itself fatal to the statute, so long as the penalty provision does not define a separate crime. N.J.Stat.Ann. § 2C:44-3e does not violate this principle.

To sustain petitioner's conviction for possession of a weapon for an unlawful purpose under N.J.Stat.Ann. § 2C:39-4a, the State had to prove four elements beyond a reasonable doubt: one, that petitioner had a firearm; two, that petitioner possessed it; three, that petitioner's purpose or conscious objective was to use it against a person or property of another; and, four, that petitioner intended to use it in a manner that was proscribed by law. *State v. Harmon*, 104 N.J. at 212, 516 A.2d at 1059. The State was not, however, required to prove that petitioner's conduct was motivated by a

discriminatory point of view to satisfy the elements of possession of a weapon for an unlawful purpose. The sentencing court's subsequent finding of motive pursuant to N.J.Stat.Ann. § 2C:44-3e was in addition to, not in lieu of, a finding of *mens rea* supported by petitioner's guilty plea under the reasonable doubt standard. N.J.Stat.Ann. § 2C:44-3e does not define a separate offense.

ii. Motive is a Traditional Sentencing Factor, Not an Essential Element of the Underlying Offense, that is Relevant to the Sentencing Phase and Verifiable at an Adversarial Hearing.

Penalty enhancement statutes single out "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm." *Mitchell*, 508 U.S. at 487-88. In enacting N.J.Stat.Ann. § 2C:44-3e, the New Jersey Legislature has determined that

> the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the [Hate Crime] statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or no reason at all.

Id. at 484-85. Petitioner confuses motive (the *sine qua non* of New Jersey's Hate Crime Statute) with criminal intent (the *sine qua non* of New Jersey's unlawful possession of a weapon statute) to claim that the Hate Crime Statute unconstitutionally allows the sentencing court to decide, by a preponderance of the evidence, a defendant's mental state

under a statute which can increase the maximum sentence. His argument that N.J.Stat.Ann.§ 2C:44-3e punishes criminal intent stems from the statute's reference to the accused's "purpose to intimidate." The *Apprendi* court, however, equated "purpose to intimidate" with "motive," (Pa22), and this Court is "bound by a state court's construction of a state statute." *Mitchell*, 508 U.S. at 483; *see also Mullaney v. Wilbur*, 421 U.S. at 691 ("state courts are the ultimate expositors of state law").

This Court has long recognized that motive need not be an essential element of the substantive offense itself. *Pointer v. United States*, 151 U.S. at 415; *see also McDowell v. United States*, 274 F.Supp. 426, 431 (E.D. Tenn. 1967) ("[T]here is no requirement, constitutional or otherwise, that motive be made an essential element of any crime.").[8] Approving an instruction that told the jury that to find the defendant guilty of murder the prosecution need not prove "that a motive for the act done existed," the *Pointer* Court

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[8] *Accord United States v. Hirschberg*, 988 F.2d 1509, 1515 (7th Cir.), *cert. denied sub. nom. Lowrance v. United States*, 510 U.S. 918 (1993); *United States v. Bagaric*, 706 F.2d 42, 53 (2d Cir.), *cert. denied sub nom. Logarusic v. United States*, 464 U.S. 840 (1983); *United States v. Brown*, 518 F.2d 821, 828 (7th Cir.), *cert. denied*, 423 U.S. 917 (1975); *Reed v. United States*, 377 F.2d 891, 893 (10th Cir. 1967); *O'Leary v. United States*, 160 F.2d 333, 335 (9th Cir. 1947); *Clifton v. State*, 73 Ala. 473, _ (1883); *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983); *State v. Gray*, 221 Conn. 713, 722, 607 A.2d 391, 396 (1992); *State v. Andrews*, 505 N.E.2d 815, 824 (Ind. App. 1987); *Marcum v. Commonwealth*, 8 K.L.Rptr. 418, _, 1 S.W. 727,728 (1886); *State v. Bahre*, 456 A.2d 860, 868 (Me. 1983); State *v. Selman*, 433 S.W.2d 572, 575 (Mo. 1968); *State v. Lucey*, 24 Mont. 295, _, 61 P. 994, 996 (1890); *Sharp v. State*, 117 Neb. 304, _, 220 N.W.2d 292, 294-95 (1928); *State v. Hampton*, 317 Or. 251, 257 n.12, 855 P.2d 621, 624 n.12 (1993); *State v. Mendoza*, 709 A.2d 1030, 1037 (R.I. 1998); *Whitaker v. State*, 160 Tex.Crim. 271, 280, 268 S.W.2d 171, 177 (1954); *State v. Powell*, 126 Wash.2d 244, 261, 893 P.2d 615, 625 (1995).

explained that motive is not indispensable to the conviction. *Pointer v. United States*, 151 U.S. at 414. "[I]f the facts constituting [murder] were established beyond a reasonable doubt, it was the duty of the jury to have found the defendant guilty as charged, although it may have been impossible to discover any adequate motive for the killing." *Ibid.*

Motive and intent are not interchangeable concepts. 21 Am. Jur. 2d. *Criminal Law* § 140 (1998); *see also Allen v. City of Los Angeles*, 92 F.3d 842, 850 (9th Cir. 1996) (under California law, motive and intent are "not synonymous"); Black's Law Dictionary 1014 (6th rev. ed. 1990) ("In law there is a distinction between" motive and intent). "Motive is the moving course, the impulse, the desire that induces the defendant to criminal action. It is distinguished from intent, which is the purpose to use a particular means to effect a certain result." *Allen v. City of Los Angeles*, 92 F.3d at 850.

> An accused can steal to prevent his family from starving or kill to rid the community of a menace, but the laudatory qualities of the design do not absolve him from the application of criminal sanctions. If it were otherwise, the administration of criminal law would become chaotic, since the prosecution would be compelled to analyze the psyche of each defendant and to prove that, in fact, it was malignant.

Morss v. Forbes, 24 N.J. 341, 359, 132 A.2d 1, 11 (1957).

When proof of motive is relevant to the case it may be offered by the prosecution to show guilt, or by the accused to show innocence. *See State v. White,* 457 S.E.2d 841, 857, 340 N.C. 264, *cert. denied*, 561 U.S. 994 (1995); *Emory v. State,* 101 Md. App. 585, 605-06, 647 A.2d 1243, 1254

(1994), *cert. denied*, 337 Md. 90, 651 *A*.2d 855 (1995); Wharton's Criminal Law *Motive* § 89 (1993). Evidence of motive helps to explain an otherwise inexplicable act of random violence. *State v. Crumb*, 277 N.J. Super. at 317, 649 A.2d at 872; *accord People v. Hoffman*, 225 Mich.App. 103, 109-10, 570 N.W.2d 146, 149 (1997). But, when proof of motive is not required for the conviction of a crime, the absence of motive, by itself, does not raise a reasonable doubt of guilt. *State v. Caruolo*, 524 A.2d 575, 584 (R.I. 1987); *State v. Bahre*, 456 A.2d 860, 868 (Me. 1983). The accused is not entitled to an acquittal of a crime "simply because his motive for perpetrating it cannot be discovered." *State v. Bahre*, 456 A.2d at 868.

The true worth of motive in a criminal prosecution is apparent at sentencing. New Jersey's sentencing statutes "emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). Although the severity of the crime is the single most important factor in New Jersey's sentencing process, *State v. Hodge*, 95 N.J. 369, 378, 471 A.2d 389, 394 (1984), a defendant also is to be considered as a "whole" person. *State v. Towey*, 244 N.J. Super. 582, 593-94, 583 A.2d 352, 357 (App. Div. 1990), *certif. denied*, 122 N.J. 159 (1990); *see also State v. Humphreys*, 89 N.J. 4, 13, 444 A.2d 569, 574 (1982). "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. at 247.

The fundamental issue involved at all sentencing proceedings is "a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. at 459 (internal citations omitted). "A sentencing judge ... is not confined to the narrow issue of guilt. His task within fixed statutory or

constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined." *Williams v. New York*, 337 U.S. at 247. A sentencing court may take into account material facts concerning a defendant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt. Thus, a sentencing judge properly may consider the offender's history of prior antisocial behavior, including uncharged crimes for which he had not been duly convicted. *Ibid*.

For example, in *United States v. Dunnigan*, 507 U.S. 87, 94 (1993), the Court held that a defendant's commission of perjury at her trial for conspiracy to distribute cocaine is "of obvious relevance" to the determination of the extent of punishment following her conviction for conspiracy "because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general."

Similarly, in *United States v. Grayson*, 438 U.S. 41 (1978), defendant was confined in a federal prison camp following a conviction for distributing a controlled dangerous substance. Defendant escaped from prison but was soon after captured. At defendant's trial for prison escape the judge found that defendant lied under oath about the circumstances of his escape and considered that factor in sentencing defendant to a term of two years imprisonment, consecutive to his unexpired term. *Id*. at 44. The Court rejected defendant's constitutional argument that he was punished for the crime of perjury for which he had not been indicted, tried or convicted by due process. "[T]he evolutionary history of sentencing ... demonstrates that it is proper -- indeed, even necessary for the rational exercise of discretion -- to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light that may shed on the sentencing decision." *Id*.

at 53. Sentencing enhancements increase a defendant's sentence because of the manner in which he committed the crime of conviction; they do not punish a defendant for crimes of which he was not convicted. *United States v. Watts*, 519 U.S. 148, 154 (1997) (citing *Witte v. United States*, 515 U.S. 389, 402-03 (1995) (per curiam)). Although neither sentence imposed in *Grayson* or *Dunnigan* was in excess of the statutory limit, the Court's endorsement of uncharged conduct as a relevant and material sentencing factor is instructive here.[9]

Motive is another important sentencing factor identified by the Court. *Mitchell*, 508 U.S. at 485. Whether the actor acts out of racial animosity, pecuniary gain, jealousy or revenge, his motive reveals his individual character at the time the underlying offense is committed. Such information is "[h]ighly relevant -- if not essential" to the selection of an

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[9] Uncharged conduct may be considered at sentencing without violating the Double Jeopardy Clause of the Fifth Amendment. Thus, a criminal defendant may be convicted and sentenced for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction. *Witte v. United States*, *supra*; *cf. Edwards v. United States*, 523 U.S. 511 (1998) (under federal sentencing guidelines, sentencing judge can consider whether the drug conspiracy of which the defendant was convicted involved both cocaine and crack, even though the jury's general verdict did not distinguish between the two factual predicates supporting the conspiracy charge); *Monge*, *supra* (sentencing court determined that the State produced insufficient evidence of qualifying prior conviction to trigger sentence enhancement under California's "three-strikes" law; double jeopardy did not prohibit a remand to the trial court to give the State a second opportunity to prove the allegation of the prior conviction); *United States v. Watts*, *supra* (under the federal sentencing guidelines, a jury's verdict of acquittal on one count does not preclude the sentencing court from considering the conduct underlying the acquitted charge in setting an appropriate sentence for the counts of which the defendant was convicted, so long as the conduct underlying the acquitted charge was proven by the Government by a preponderance of the evidence).

appropriate sentence. *Williams v. New York*, 337 U.S. at 247. Thus, in *Barclay v. Florida*, 463 U.S. 939, 949 (1983) (plurality opinion), the Court determined that the Eighth and Fourteenth Amendments to the United States Constitution do not prohibit a judge from taking into account the racial hatred fueling the murder for which the defendant was convicted in determining whether he should be sentenced to die. In *Dawson v. Delaware*, 503 U.S. 159, 165 (1992), a later death penalty case, the Court added "that the Constitution does not erect a per se barrier to the admission of evidence concerning one's belief and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[10] The basic precept of *Barclay* and *Dawson* -- that evidence of racial animus as the motivation for the substantive offense is a relevant sentencing factor -- applies to both capital and noncapital penalty enhancement provisions. *Mitchell*, 508 U.S. at 485-86.

Petitioner's motive for firing at the Fowlkes' house has at least as much relevancy to sentencing following a conviction for the crime of possession of a weapon for an unlawful purpose as would, for example, a prior conviction for an unrelated offense. *See McMillan*, *supra* (state court could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty); *cf. Edwards v. United States*, 523 U.S. 511 (1998) (following a conviction for conspiracy to distribute cocaine, the trial court may consider the defendant's crack-related activities that constitute part of the "same course of

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[10] The evidence in *Barclay* established the defendant's membership in the Black Liberation Army and espoused desire to provoke a "race war," and was related to the murder of a white man for which Barclay was convicted. *Barclay v. Florida*, 463 U.S. at 942-44. The evidence in *Dawson*, in contrast, established only the defendant's abstract beliefs of white supremacy that had no bearing on the victim's murder, and could not be considered at sentencing. *Dawson v. Delaware*, 503 U.S. at 165-66.

conduct, or common scheme, or plan" as sentence-related "relevant conduct"). The *Apprendi* court found that the language "because of" as used in N.J.Stat.Ann. § 2C:44-3e ("The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity") demands a causal link between the infliction of injury and bias motivation. (Pa26-27). "The requirements of the [Hate Crime] act are strict. It is not enough to show that during the commission of the crime the actor may have exhibited bias. The question is whether the purpose of the crime was to exhibit bias." (Pa26). This exacting nexus permits the sentencing court to glean the defendant's character at the moment he committed the offense, heightening the relevancy of this sentencing factor.[11]

Amici Curiae National Association of Criminal Defense Lawyers, *et al.*, cites no support for its theory that the sentencing judge "often has limited personal experience with racially motivated behavior" and for this reason such questions are better left to the jury. (*Amici* Brief at 14). The State suggests that the contrary is true: judges who regularly preside over criminal trials are more likely than the average juror to have knowledge of and understand hate crimes, and to possess the capacity to deal with them rationally and evenhandedly. As the Court noted in the context of death penalty sentencing, "it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt v. Florida*, 428

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[11] This statutorily-required nexus also overcomes the First Amendment concerns of *Dawson v. Delaware*, 503 U.S. at 166, that an individual's affiliation with a racist group be relevant to the crime for which he is being sentenced, or to the sentencing proceeding itself. *See Apprendi* at Pa2; *see also* n.10, *supra*.

U.S. 242, 252 (1976). And, as demonstrated by the sentencing judge in *Barclay v. Florida*, 463 U.S. at 948-50, who discussed Barclay's racial motive for the murder and compared it with his own experiences in the army in World War II, when he saw Nazi concentration camps and their victims, judges are no more likely than jurors to be insulated from the harsh realities of hate crimes in society.

Motive is not only highly relevant to the sentencing equation, it is verifiable in an adversarial proceeding. In *Jones*, 526 U.S. at 249, the Court noted in examining the traditional sentencing factor of recidivism that a prior conviction, "unlike virtually any other consideration used to enlarge the possible penalty for an offense, certainly unlike the factor [of serious bodily injury], ... must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." That a prior conviction is readily determined on the basis of an official court record is, however, unique to the nature of recidivism. Most sentencing factors do not come stamped with court seals attesting to their correctness or authenticity. Indeed, with regard to recidivist statutes, what is constitutionally required is not the procedure by which the sentencing court is alerted to the prior conviction, but that the prior conviction was obtained in a constitutional manner. *See ibid.* ("a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). Thus, *Jones* cannot be read to constitutionally-require that every sentencing factor resulting in an enhanced sentence be verifiable in the singular manner in which a prior conviction is verifiable.

Unlike prior convictions which are provable by court record, actual conduct is proven at an adversarial hearing where "the defendant is represented by counsel, counsel can put the State to its proof, examining its witnesses, rebutting its evidence, and testing the reliability of its allegations." *Nichols v. United States*, 511 U.S. 738, 760 (1994)

(Blackmun, J., dissenting). Petitioner here, in fact, had the benefit of just such an adversarial proceeding. *See subsection B iii, infra*. The method by which motive is proven is obviously different than that employed to prove the existence of a prior conviction, but it is a perfectly reliable one.

iii. N.J.Stat.Ann. § 2C:44-3e Grants Criminal Defendants Notice and Opportunity to be Heard, and thus Satisfies Due Process of Law.

To the extent that petitioner believes he is entitled to due process of law because of the "stigma of bigotry" (Pet. Brief at 38), the State notes that harm to one's reputation alone does not invoke a protectible liberty that triggers procedural due process rights. *Paul v. Davis*, 424 U.S. 693 (1976).[12] When stigmatic harm is coupled with the impairment of some additional interest, such as punishment, due process is of course implicated. *Id.* The State in fact afforded petitioner procedural due process, that is, notice and opportunity to be heard, before he was sentenced under the extended term provision of the Hate Crime Statute.

Because motive is a sentencing factor, and not an essential element of count eighteen of the indictment charging possession of a weapon for an unlawful purpose, petitioner was not entitled to receive notice by indictment of the possibility of an extended term based on racial animus. *See Almendarez-Torres, supra*. Nonetheless, petitioner certainly cannot claim he was surprised when the State formally filed its Notice of Motion to seek an extended term under

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[12] Not all criminal defendants would, as petitioner suggests, be appalled at being branded a "racist." Some proudly brand themselves with tattoos or join groups that openly advocate racism. *See, e.g., Dawson v. Delaware*, 503 U.S. at 161-62 (Dawson tattooed the words "Aryan Brotherhood" on the back of his right hand and tattooed multiple swastikas on his back, he painted a swastika on the wall of his prison cell, and he was a member of a white racist prison gang).

N.J.Stat.Ann. § 2C:44-3e. Petitioner admitted to the police that he fired shots into the Fowlkes' home because the residents were black and he was "giving them a message" that they were unwelcome in petitioner's neighborhood. (Pa174-78; Pa299). Pursuant to New Jersey's discovery rules, the State was required within fourteen days of the return of the indictment to make available to the defense for inspection "records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded." N.J. Court Rule 3:13-3(b), (c)(2). Broad state discovery rules, *see* N.J. Court Rules 3:13-3, thus insured that petitioner was in possession of his statement, as well as all other information pertaining to his case, whether inculpatory or exculpatory, other than work product, in the State's files well in advance of the time petitioner had to choose between pleading guilty to certain counts of the indictment or defending the charges against him and proceeding to trial. N.J. Court Rule 3:21-4(e) additionally required the prosecution to give notice to petitioner of its intention to seek an extended term under N.J.Stat.Ann. § 2C:44-3e by filing the appropriate motion at or prior to the negotiated plea.[13]

Not only did petitioner know of the State's intention to seek an extended term prior to the entry of his guilty plea (Ja21; Ja41; Ja43; Pa166), he testified in his own behalf (Pa236-79), offered the testimony of seven character witnesses and one expert witness (Pa182-235), and cross-examined the State's witnesses (Pa110-120; Pa178-181; Pa289-299) at the sentencing hearing before Judge Ridgway. Consequently, the Hate Crime Statute afforded petitioner the requisite procedural

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[13] Where a criminal defendant does not enter into a negotiated plea agreement, N.J. Court Rule 3:21-4(e) provides that a motion for an enhanced sentence "shall be filed with the court by the prosecutor within 14 days of the entry of defendant's guilty plea or of the return of the verdict."

safeguards of notice and opportunity to be heard at the sentencing stage. *Compare Specht v. Patterson*, 386 U.S. at 608 (commitment proceedings under Colorado Sex Offenders Act did not permit defendant an opportunity to present his own evidence or confront witnesses against him).

The particular standard of proof at the sentencing hearing prescribed by N.J.Stat.Ann. § 2C:44-3e -- preponderance of the evidence -- also comports with due process of law. *McMillan*, 477 U.S. at 91. While trials on guilt "always have been hedged in by strict evidentiary procedural limitations," *Williams v. New York*, 337 U.S. at 246, and require proof beyond a reasonable doubt of all elements, *In re Winship*, 397 U.S. at 364, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91. This is because criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. *Id.* at 92 n.8. Petitioner's reliance on cases addressing the intermediate standard of proof of "clear and convincing" evidence required in particular civil actions [*Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization)] is misplaced. The *McMillan* Court has rejected the argument that *Addington* requires application of the "clear and convincing" standard of proof in criminal sentencing proceedings. *McMillan*, 477 U.S. at 92 n.8.

As the *Apprendi* court below suggested in its review of the evidence presented at the sentencing hearing, the State far exceeded its statutory burden of proof by a preponderance of the evidence:

> [W]e are satisfied that no court could but conclude that the actor's purpose was, in fact, to intimidate the victims because of their color. The only question before the trial court was whether defendant's mental state, subjected to alcoholism, was such that he could not form the biased purpose. The trial court's review of the evidence submitted by defendant adequately disposed of that issue. There is no real question as to this actor's purpose in shooting into his neighbors' home.

(Pa27). And, despite the fact that at the extended term sentencing hearing before Judge Ridgway the State was not bound by the stringent evidentiary rules and high burden of proof required at a jury trial, *McMillan*, 477 U.S. at 91, no evidence was presented by the prosecution at the sentencing hearing that would have been inadmissible at a jury trial.

In its direct case, the State introduced the testimony of Michael Fowlkes, the victim, who gave a factual account of the shootings and described the resulting structural damage to his house. (Pa98-121).[14] Detective Dennis D'Augostine's testimony on direct was limited to the content of petitioner's statement to the police, namely, that petitioner "knew that there were black people who lived at that residence because he's seen them in the yard. And he was giving them a message that they were in his neighborhood." (Pa174-78). In response to petitioner's defense that his confession was prompted by drugs, alcohol and fear of imprisonment, the detective explained on rebuttal that petitioner "clearly understood" his *Miranda* rights, he was not under the influence of drugs or alcohol, and he was never threatened or given promises in exchange for a confession. (Pa281-300). Notably, petitioner stipulated that his confession complied

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[14] Potentially inadmissible hearsay was introduced by defense counsel on cross-examination of Mr. Fowlkes. (Pa111-13).

with *Miranda*. (Pa288-89). Thus, while the statutorily-prescribed threshold burden of proof that the prosecution shouldered was by a preponderance of the evidence, N.J.Stat.Ann. § 2C:44-3e, the State obviously surpassed this requirement, achieving the "clear and convincing" standard, *see Kikumura v. United States*, 918 F.2d 1084, 1100-02 (3d Cir. 1990), if not the "beyond a reasonable doubt" standard required to prove elements of the underlying offense. *In re Winship*, *supra*. There is no doubt in this case that the additional extended term was properly, and constitutionally, imposed.

The actual increase in sentence petitioner received under N.J.S.A. § 2C:44-3e -- two years -- suggests no breach of constitutional limits. Petitioner's claim that the sentencing statute had the effect of doubling his maximum sentence for the primary offense (Pet. Brief at 5) is misleading. Petitioner entered a guilty plea to possession of a weapon for an unlawful purpose, N.J.Stat.Ann. § 2C:39-3a, a second degree offense. The ordinary sentencing range for a second degree crime is between five and ten years. N.J.Stat.Ann. § 2C:43-6a(2). The extended sentencing range for a second degree crime is between ten and twenty years. N.J.Stat.Ann. § 2C:43-7a(3). Petitioner's actual maximum sentence imposed by Judge Ridgway was twelve years, only a two-year increase above the ten-year ordinary maximum term that the trial court could have imposed following a conviction for second degree possession of a weapon for an unlawful purpose without an extended term.[15]

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[15] The Court has noted, but never addressed, the divergence of opinion among the federal courts as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence to satisfy due process. *Almendarez-Torres*, 523 U.S. at 248; *United States v. Watts*, 519 U.S. at 156-57. Petitioner's two-year increase in sentence from an ordinary maximum of ten years to an enhanced term of twelve years is not (continued...)

But even if petitioner's maximum sentence were in fact doubled from ten to twenty years because of the extended term provision, that sentence would still fall within constitutional parameters. In *Almendarez-Torres,* 523 U.S. at 226-27, the Court upheld a potential eighteen-year increase to a two-year sentence under 8 U.S.C. § 1326. In *Monge*, 524 U.S. at 729, the Court approved a California law which permits the sentencing judge to double a sentence from seven to fourteen years following a conviction for using a minor to sell drugs where the offender previously has been convicted of a qualifying felony. Neither the potential length of the maximum term that could be imposed pursuant to N.J.Stat.Ann. § 2C:44-3e nor the term actually imposed following petitioner's plea of guilty to a second degree offense transgresses constitutional boundaries.

Several states have enacted hate crime penalty enhancement statutes which, like New Jersey's, designate motive as an aggravating factor to be considered by the sentencing court in increasing the prison term for the predicate conviction. Mont. Code Ann. § 45-5-222 (1999) (gives sentencing court discretion to impose an additional term of two to ten years to run consecutively to the term imposed for the predicate offense); Nev.Rev.Stat. § 193.1675 (1995) (gives sentencing court discretion to impose an additional term not to exceed 25% of the term of imprisonment prescribed by statute for the predicate crime; specifically "does not create a

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[15](...continued)
disproportionate to the offense to which he pleaded guilty, and thus does not present an "exceptional case." *Cf., e.g., United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999), *petition for cert. filed sub nom. United States v. Reed*, 68 U.S.L.W 3433 (filed December 29, 1999) (No. 99-1096) (seven-level adjustment under federal sentencing guidelines which increased potential maximum term of incarceration by 260% presents an exceptional case); *Kikumura v. United States*, 918 F.2d at 1100-02 (increase under federal sentencing guidelines from about 30 months to 30 years presents an exceptional case).

separate offense but provides an additional penalty for the primary offense"); Tex. Penal Code Ann. § 12.47 (Vernon 1994) (when sentencing court finds that the offense, other than a first degree felony or a Class A misdemeanor, was committed because of bias or prejudice, the punishment for the offense is increased to the punishment prescribed for the next highest category of offense).

That other jurisdictions have enacted hate crime statutes expressly making subjective motivation an essential element of the crime, *see, e.g.*, Fla.Stat.Ann. § 775.085(3) (West 1991); *Richards v. State*, 643 So.2d 89 (Fla. Dist. Ct. App. 1994); and Wis. Stat. Ann. § 939.645(3) (West 1996); *Mitchell*, 508 U.S. at 481 n.1, does not affect the validity of New Jersey's statutory scheme.[16] States are of course free to

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[16] Petitioner notes that the harassment statute, N.J.Stat.Ann. § 2C:33-4d (West 1995), which elevates harassment from a petty disorderly persons offense to a fourth degree crime if the defendant acted with a biased purpose, and the assault statute, N.J.Stat.Ann. § 2C:12-1e (West 1995), which elevates simple assault from a disorderly persons offense to a fourth degree crime if the defendant acted with a biased purpose, appear in that part of the Code defining substantive offenses. Petitioner's claim that these statutes create new crimes based on bias (Pet. Brief at 28) was rejected in *State v. Mortimer, supra*, in which the Supreme Court of New Jersey found that N.J.Stat.Ann. § 2C:33-4d is a "victim-selection" or "penalty enhancement" provision that increases the penalty associated with the underlying criminal act, such as assault, trespass, or battery, where a biased motivation is found, but does not create a substantive offense. *State v. Mortimer*, 135 N.J. at 525, 641 A.2d at 261-62.

To increase the punishment for simple assault or harassment motivated by racial animosity the New Jersey Legislature by necessity had to incorporate the penalty enhancers within the respective statutes defining these offenses, rather than lumping simple assault and harassment among the crimes eligible for extended term sentencing under N.J.Stat.Ann.§ 2C:44-3e. Extended term sentencing is applicable only to a person "convicted of a crime." N.J.Stat.Ann. § 2C:43-7a (West 1995). (continued...)

offer greater protection than provided by the United States Constitution based on their own state constitutions or public policy. *Nichols v. United States*, 511 U.S. at 748 n.12. "[T]he fact that the States have formulated different statutory schemes to punish" crimes motivated by racial bias "is merely a reflection of our federal system, which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.'" *McMillan*, 477 U.S. at 90 (citing *Spencer v. Texas*, 385 U.S. 554, 566 (1967)); *accord State v. Krantz*, 788 P.2d 298, 305 (Mont.), *cert. denied*, 498 U.S. 938 (1990). That New Jersey's "particular approach has been adopted in few other States does not render [New Jersey's] choice unconstitutional" under a due process claim. *McMillan*, 477 U.S. at 90; *see also Spaziano v. Florida*, 468 U.S. at 464 (the Court upheld a death penalty sentencing scheme adopted by only three of thirty-seven jurisdictions with capital sentencing statutes). This Court should be "unwilling to say that there is any one right way for a state to set up its [hate crime] sentencing scheme." *Spaziano v. Florida*, 468 U.S. at 464.

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[16](...continued)
"Crimes" are defined in the Code as offenses "for which a sentence of imprisonment in excess of 6 months is authorized" and are designated "as being of the first, second, third or fourth degree." N.J.Stat.Ann. § 2C:1-4a (West 1995). Disorderly persons offenses and petty disorderly persons offenses "are not crimes within the meaning of the Constitution of this State." N.J.Stat.Ann. § 2C:1-4b (West 1995). Persons accused of disorderly persons offenses and petty disorderly persons offenses have "no right to indictment by a grand jury nor any right to trial by jury on such offenses" and "[c]onviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime." *Ibid.* Thus, "the more serious charge of assault or harassment with the purpose to intimidate because of status triggers the right to grand jury indictment and jury trial." *State v. Apprendi*, 304 N.J. Super. at 164 n.8, 698 A.2d at 1274 n.8 (Wecker, J., dissenting) (Pa72).

In sum, New Jersey's Hate Crime Statute creates a constitutionally-valid statutory scheme permitting the sentencing court to impose an extended term of imprisonment once it is satisfied by a preponderance of the evidence that the underlying crime was racially motivated. The New Jersey Legislature did not create a new element of any offense that must be proven beyond a reasonable doubt, but took "one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." *McMillan,* 477 U.S. at 89-90. The conclusion reached by the Supreme Court of New Jersey that the Hate Crime Statute does not overstep the constitutional limits erected by this Court is firmly supported by this Court's decisions addressing the "sentencing factors versus elements" debate and insures that petitioner's constitutional rights were fully protected.

CONCLUSION

The judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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Dated: February 14, 2000